

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

JOSEPH DELHALL

** RE-SENTENCING **

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

CASE NUMBER: CR-03-549 (ARR)

DOUGLAS G. MORRIS, ESQ

16 COURT STREET, 3rd FL.

BROOKLYN, NEW YORK 11241

Defendant's Attorney & Address

THE DEFENDANT:

XXX pleaded guilty to count one of the indictment.
— was found guilty on counts

Accordingly, the defendant is ADJUDGED guilty of such count(s), which involve the
following offenses: after a plea of not guilty.

TITLE & SECTION

8 USC 1326(a) & (b) (2)

NATURE & OFFENSE

ILLEGAL RE-ENTRY

FOLLOWING DEPORTATION.

COUNT NUMBER(S)

ONE (1)

The defendant is sentenced as provided in pages 2 through of this Judgment.
The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

— The defendant has been found not guilty on count(s) and is discharged as
to such count(s).

— Remaining counts are dismissed on the motion of the United States.

XXX It is ordered that the defendant shall pay to the United States a special
assessment of \$100.00 which shall be due XXX immediately as follows:

It is further ORDERED that the defendant shall notify the United States Attorney for this
district within 30 days of any change of residence or mailing address until all fines,
restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec #

Defendant's Date of Birth 11/22/55

Defendant's Mailing Address:

27 WARTERLOO ROAD

KINGSTON, JAMAICA

Defendant's Residence Address:

(SAME AS ABOVE)

JANUARY 17 2006

Date of Imposition of Sentence

ALLYNE R. ROSS, U.S.D.J.

JANUARY 17 2006

Date

A TRUE COPY ATTEST

Date:

ROBERT C. HEINEMANN
CLERK OF COURT

By:

DEPUTY CLERK

Defendant: JOSEPH DELHALL
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IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of forty six (46) months.

XXX The Court makes the following recommendations to the Bureau of Prisons:
THAT THE DEFT BE HOUSED IN A FACILITY IN THE METROPOLITAN AREA.

____ The defendant is remanded to the custody of the United States Marshal.
____ The defendant shall surrender to the United States Marshal for this district,

____ at _____ a.m./p.m. on _____
____ as notified by the Marshal.

____ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

____ before 12:00 noon on _____
____ as notified by the United States Marshal.
____ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at _____
_____, with a certified copy of this Judgment.

United States Marshal

By _____

Defendant: JOSEPH DELHALL
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SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

- 1) IF EXCLUDED; DEFT SHALL NOT RE-ENTER THE UNITED STATES ILLEGALLY.
- 2) DEFT SHALL NOT POSSESS ANY FIREARMS.

— The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

STANDARD CONDITIONS OF SUPERVISION

Judgment: While the defendant is on probation or supervised release pursuant to this

- 1) The defendant shall not commit another Federal, state or local crime;
- 2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 5) the defendant shall support his or her dependents and meet other family responsibilities;
- 6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
- 8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- 9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

Defendant: JOSEPH DELHALL
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FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of \$ 100.00, consisting of a fine of \$ N/A and a special assessment of \$ 100.00.

— These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

This sum shall be paid immediately
 as follows:

XXX The Court has determined that the defendant does not have the ability to pay any fines, cost of confinement or supervision.

- The interest requirement is waived.
- The interest requirement is modified as follows:

1 THE COURT: Okay. As set forth in my prior
2 order in this case following the Circuit's remand of the
3 case for further proceedings in conformity with United
4 States v. Crosby, and after reviewing the defendant's
5 motion for resentence and reply papers and the
6 Government's opposition to the defendant's motion and
7 defendant's original pre-sentence reports and all
8 materials submitted in connection with his original
9 sentence and the transcript of the sentencing proceeding,
10 I determined that under the current sentencing scheme, I
11 would impose on Mr. Delhall a sentence nontrivially
12 different from the 57 months' incarceration that I imposed
13 assuming the guidelines to be mandatory.

14 Although invited to do so, if they wished, the
15 parties have not found it necessary to further supplement
16 the record for this sentencing proceeding.

17 In resentencing the defendant, under Section
18 3553(a) I have, of course, considered the guidelines as
19 found by the defendant's original pre-sentence report, his
20 adjusted offense level of 21 and Criminal History Category
21 of IV calls for a guideline sentence of 57 to 71 months
22 imprisonment. Although defendant originally sought a
23 downward departure under the guidelines on the ground that
24 Criminal History Category IV substantially overstated the
25 seriousness of defendant's criminal history, he no longer

1 seeks a guidelines departure.

2 Rather, defendant requests a non-guidelines
3 sentence below the advisory guideline range. His
4 principal contention is that under the Sentencing Reform
5 Act, specifically, subdivision (6) of Title 18 United
6 States Code Section 3553(a), a sentence more lenient than
7 that called for by the now-advisory guidelines is
8 necessary to avoid creating an unwarranted disparity with
9 the sentences received by illegal reentry defendants
10 arrested and charged in so-called "fast track" districts.

11 Fast track programs were originally designed to
12 accelerate dispositions in certain border districts
13 burdened by high volumes of illegal reentry cases. These
14 included the Northern, Central, Eastern and Southern
15 Districts of California, the Tucson, Phoenix, and Yuma
16 Divisions of the District of Arizona, the District of New
17 Mexico, and the Southern and Western Districts of Texas.
18 Although initially operated in such border districts, fast
19 track programs have been since extended to non-border
20 districts, specifically, the Districts of Idaho, Nebraska,
21 North Dakota, and Oregon. In all of the districts,
22 defendants who agree to enter prompt guilty pleas to
23 illegal reentry offenses and forfeit certain other
24 procedural rights are accorded a reduction in sentence,
25 which in some districts may be substantial. Although some

1 of these districts implement the lower sentence by charge
2 bargains to lesser offenses, most do so by downward
3 departures of 1 to 4 offense levels, depending upon the
4 particular district policy and the circumstances of the
5 individual defendant.

6 Defendant contends that imposition of a sentence
7 that fails to account for disparities between fast track
8 and non-fast track districts such as the Eastern District
9 of New York subverts the statutory mandate that sentences
10 imposed consider "the need to avoid unwarranted sentencing
11 disparities." That's section 3553(a)(6). Defendant
12 argues that when offenders may be distinguished solely by
13 the district of their arrest, significant differences in
14 sentencing cannot be legitimate. Quoting Judge Kaplan in
15 his opinion in United States v. Bonnet-Grullon, 53 F.
16 Supp. 2d 430.435 (Southern District of New York 1999), he
17 observes that "it is difficult to imagine a sentencing
18 disparity less warranted than one which depends upon the
19 accident of the judicial district in which defendant
20 happens to be arrested." Counsel also cites the
21 Sentencing Commission's own recognition that fast track
22 programs created geographical disparities that "appears to
23 be at odds with the overall Sentencing Reform Act goal of
24 reducing unwarranted sentencing disparity among
25 similarly-situated offenders." Sentencing Commission

1 Report to Congress at 67.

2 The Government resists any sentencing adjustment
3 in this case based on a recognition of the differences in
4 the length of sentences imposed in fast track and non-fast
5 track districts.

6 At the outset, the Government assumes arguendo
7 that the defendant is correct in arguing that sentencing
8 disparities between fast track districts and non-fast
9 track districts should not be allowed to persist in light
10 of Title 18 United States Code Section 3553(a)(6).

11 Nonetheless, the defendant argues principally
12 that courts may not properly intrude upon the charging and
13 departure decisions of prosecutors which are committed to
14 a prosecutor's traditional discretion;

15 Secondly, that such disparities should be
16 eliminated not by judicial consideration of this statutory
17 sentencing factor in non-fast track districts but by
18 government elimination of fast track programs;

19 And, third, that it would be inappropriate in
20 this case to consider the statutory factor concerning
21 sentencing disparities because that factor is outweighed
22 by what the Government characterizes as defendant's
23 "particularly egregious" criminal history.

24 I am not persuaded by the Government's
25 arguments.

1 At the outset, although the Government asserts
2 that it assumes that fast track sentencing disparities
3 should not be allowed to persist in light of 3553(a)(6),
4 as the Government appears to acknowledge, the Court is
5 obligated to determine a "reasonable" sentence based on
6 the statutory sentencing factors. Subdivision (a)(6)
7 explicitly directs courts in assessing an appropriate
8 sentence to consider, among other factors, "the need to
9 avoid unwarranted sentencing disparities among defendants
10 with similar records who have been found guilty of similar
11 conduct." Thus, as concluded by Judge Kaplan in his oral
12 opinion in United States v. Krukowski, 04-CR-1309
13 (Southern District of New York July 25, 2005), the "text
14 of the Sentencing Reform Act strongly suggests that the
15 measure of whether a disparity is warranted depends upon
16 the characteristics of the defendants that their
17 conduct."

18 The Government's principal argument -- that any
19 adjustment of the disparity improperly thwarts
20 prosecutorial discretion -- elides the premise that the
21 Government has assertedly assumed to be true. No one
22 disputes that the Department of Justice is free to bring
23 charges or not, plea bargain with those charged, and agree
24 to downward departures or other arrangements designed to
25 induce guilty pleas. But, as the Court wrote in United

1 States v. Peralta-Espinoza, 383 F. Supp. 2d 1107, 1110
2 Eastern District of Wisconsin 2005), "[A] Court's
3 reduction of a defendant's sentence based on fast track
4 disparity violates none of these prerogatives. Such a
5 reduction is a sentencing issue and sentencing is
6 primarily a judicial function. Prosecutors decide the
7 charge, but courts must consider Section 3553(a)(6),
8 regardless of the prosecutor's sentencing recommendation."

9 Significantly, too, most of these fast track schemes are
10 implemented by sentencing departures rather than charge
11 bargains to lesser offenses. In departure districts, the
12 resulting of lower sentences are thus judicially imposed.

13 Nor does the Second Circuit's opinion in United
14 States v. Bonnet-Grullon, 212 F.3d 692 (Second Circuit
15 2000), suggests that, in the circumstances of this case,
16 the Circuit would reach a contrary conclusion. There, the
17 circuit, pre-Booker, addressed the propriety of a
18 departure under the sentencing guidelines. It held that a
19 downward departure based upon a non-fast track sentencing
20 disparity was not authorized by the guidelines because the
21 circumstances upon which the application was based had
22 been specifically considered and rejected by the
23 Sentencing Commission, thus eliminating any basis for a
24 guidelines departure. The guidelines are now advisory
25 only, and no guidelines departure is under consideration

1 with respect to defendant's complaint of an unwarranted
2 sentencing disparity. Rather, in fashioning an
3 appropriate sentence in the case of the defendant before
4 me, I am obligated to consider the provisions of Section
5 3553(a)(6) among the other statutory factors. The
6 "fundamental reasoning underlying Bonnet-Grullon" is not
7 that prosecutorial discretion to create disparities by
8 fast track programs trumps the duty incumbent upon judges
9 to adhere to the sentencing statute in fashioning a
10 sentence. Bonnet-Grullon concerned solely the propriety
11 of a downward departure under the then mandatory
12 guidelines scheme.

13 More unpersuasive is the Government's argument
14 that whatever disparities exist "should be eliminated by
15 sentencing defendants in fast track districts to the
16 higher sentences that they would have received in the
17 non-fast track districts, rather than the other way
18 around." Quite simply, the Court is constrained in this
19 case to adhere to the dictates of the sentencing statute
20 including the requirement that it impose a sentence that
21 will "avoid unwarranted sentencing disparities..."

22 Section 3553(a)(6). I simply cannot rely upon the
23 Government to take actions that may or may not achieve
24 that result in future cases.

25 The Government is correct that consideration of

1 sentencing disparities is but one factor to consider in
2 determining an appropriate sentence under Section 3553.
3 No doubt, too, there are cases in which, notwithstanding
4 undue disparities, the significance of other sentencing
5 factors militating for a longer sentence is so great as to
6 outweigh the need to avoid undue disparities among
7 defendants occasioned by the happenstance of the district
8 in which they are prosecuted. But I disagree with the
9 Government that the undue disparity factor here is wholly
10 offset by the history and characteristics of the
11 defendant -- particularly, the defendant's criminal
12 history.

13 It is true that for reasons I expressed at
14 sentence, I rejected the argument that Criminal History
15 Category IV overstated the seriousness of defendant's
16 criminal history and I am still of the view that this
17 provides no basis for a downward departure under the
18 guidelines.

19 Nonetheless, I do not believe that factor is so
20 aggravating in this case as to preclude some recognition
21 of the need to adjust the sentence to avoid unwarranted
22 disparities.

23 At the original sentencing, defense counsel was
24 correct in his argument that his client's criminal
25 conduct, apart from the illegal reentry, was, by that

1 time, remote, having concluded some 15 years before. It
2 is true that defendant was on absconder status having
3 failed to surrender for service of his 1986 sentence. But
4 that continuing failure to surrender is not comfortably
5 equated with persistent, repeated criminal activity.
6 Moreover, defendant was not apprehended after his reentry
7 because of the commission of any further criminal conduct;
8 nor does the record indicate any affirmative criminal
9 conduct -- again, apart from the reentry -- engaged in by
10 defendant since 1989. Accordingly, I am now inclined to
11 agree with defense counsel that the circumstances of
12 defendant's criminal history may suggest a lesser
13 likelihood of recidivism than many, if not most,
14 defendants in Criminal History Category IV. In any event,
15 defendant's likelihood of recidivism and need for
16 deterrence is surely no greater than defendants typically
17 within that category. Nor is this conclusion altered by
18 the fact that defendant, now over 50 years of age, when he
19 was between the ages of 24 and 27, committed a series of
20 marijuana infractions for which he was fined and a
21 possessory offense for which he received three years
22 probation. Without impugning the seriousness of his
23 conduct, it occurred between 22 and 25 years ago, and does
24 not so aggravate the severity of defendant's past
25 criminality or the risk of future recidivism as to warrant

1 disregard of the statutory requirement that I consider the
2 need to avoid unwarranted sentencing disparities.

3 Notably, based on the Government's description
4 of the various fast track districts employing a departure
5 scheme for sentencing illegally reentering aliens (as
6 opposed to a charge-bargain program), all call for a
7 sentencing reduction in cases analogous to the
8 defendant's -- that is, a total offense level of 21,
9 Criminal History Category IV -- of between 2 and 4 levels.
10 In those jurisdictions, defendants would face sentencing
11 ranges of 46 to 57 months, 41 to 51 months, or 37 to
12 46 months. Thus, adjusting defendant's sentence to
13 account for what I view as an unwarranted sentencing
14 disparity must entail no more lenient a sentence than
15 would be accorded in those districts.

16 Taking into consideration the sentencing factors
17 enumerated in Section 3553(a), and most particularly the
18 advisory guidelines, the circumstances and seriousness of
19 the offense, the history and characteristics of the
20 defendant, the need for the sentence to reflect the
21 seriousness of the offense and impose just punishment and
22 to ensure deterrence and protect the safety of the public
23 and deter recidivism. I am persuaded that a sentence of
24 46 months is sufficient but no more severe than necessary
25 to effect the goals of sentencing.